

news release

# Senate Select Committee

## on Intelligence

Approved For Release 2004/07/16 : CIA-RDP81M00980R000800090045-6

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FOR RELEASE AT 6:00 P.M., EDT  
TUESDAY, OCTOBER 10, 1978

77-5327/A

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### STATEMENT BY SENATOR JOSEPH R. BIDEN, JR.

The release of this report culminates eighteen months of study by the Intelligence Committee's Subcommittee on Secrecy and Disclosure, which I chair. During this period we have undertaken an intensive study of the role national security secrets play in the administration of justice.

The material contained in this report and the testimony of witnesses before our Subcommittee earlier this year point to a shocking phenomenon which undermines the enforcement of all laws relating to intelligence operations. Simply stated, the government refrains from prosecuting certain lawbreakers due to the fear that sensitive information would be revealed in the course of a trial.

An astute defense counsel, who might represent a defendant who has leaked sensitive information, bribed government officials, or spied for a foreign power, can threaten the Justice Department with disclosure of classified information in the course of the trial. He hopes that with this threat he can force dismissal of the prosecution. A news story

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(MORE)

recently described this tactic as a "game of chicken."  
For the purpose of this report, we call it "gray mail."

The defense counsel in these cases has learned what the public and the Congress are just discovering. The government often decides -- understandably and perhaps justifiably in some cases -- that the leaker, briber, or spy should go unpunished rather than risk disclosure of national security secrets.

In brief summary, the Committee made four basic findings with respect to the "gray mail" phenomenon:

(1) There has been a major failure on the part of the government to take action in leak cases. The Committee reached this conclusion based on our review of cases where there had been very serious leaks which were clearly criminal but which went unprosecuted.

(2) Several immediate steps may be taken to facilitate the administration of existing laws, while Congress determines the need for major revision of the espionage statutes. This finding has been by far the most controversial and was the cause of separate views by Senators Stevenson and Wallop. Both of my colleagues would like to see the Committee consider amendments to the espionage statutes to cover leaks more explicitly. However, the Committee, based on our presentation, recognized that even the most draconian leak statute might not be enforceable in the face of the "gray mail" phenomenon and therefore

preferred to see Congress focus its attention on "gray mail" per se.

(3) Disagreements over the use of classified information in prosecutions also impede espionage prosecutions. The evidence we presented on this matter was of gravest concern to the members. Although it was not nearly as widespread as in the leak situation, the fact that "gray mail" can and does occur in spy investigations and prosecutions was a genuine shock to me and the other members.

(4) The impasse over the use of classified information in the prosecutions occurs in other types of criminal cases and at times defendants may have placed the Department of Justice at a marked disadvantage in perjury, narcotics, and possibly even one murder case. The fact that "gray mail" operates in these areas of criminal activity raised in my mind the fear that it may be impossible to enforce the criminal law in the intelligence community. If the Justice Department is subject to these kinds of threats in murder cases, then not only are espionage and leak statutes unenforceable in the intelligence community, but no legislative charters we draft or indeed any criminal law would be enforceable against the intelligence community or anyone associated with it.

In conclusion, I personally think that this report will be remembered for two things. First, I believe that it lays to

rest once and for all the contention that more draconian statutes will have any significant effect on leaks to the newspapers. I believe that no matter what statutes we draft in this area, no matter how stiff the penalty or broad the scope they will be just as subject to the "gray mail" phenomenon as existing leak statutes and will probably be unenforceable.

Second, this report will be of great value for its description of the "gray mail" phenomenon, which raises questions concerning the application of the rule of law to intelligence activities. I firmly believe that if we do not tackle this problem that much of the legislative charters we are developing will be "dead letter" as soon as they are enacted.

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